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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 160

ELGIN-JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,
Petitioner,

v.

G. W. BURLEY, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM AND AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS

In Support of Petition for Rehearing

LEE PRESSMAN,
FRANK DONNER,
Counsel for Congress of Industrial Organizations
United Steelworkers of America and
United Railroad Workers of America

John J. Abt, Special Counsel
Amalgamated Clothing Workers of America

Ralph Helstein, General Counsel
United Packinghouse Workers of America

Isadore Katz, General Counsel
Textile Workers Union of America

Gladstein, Grossman, Sawyer & Edises,
General Counsel
International Longshoremen's & Warehousemen's Union

Boudin, Cohn & Glickstein,
General Counsel
United Office & Professional Workers of America

Victor Rabinowitz, General Counsel
American Communications Association

Morris Isserman, General Counsel
American Newspaper Guild

M. H. Goldstein, General Counsel
Industrial Union Marine & Shipbuilding Workers of America

Ben Meyers, General Counsel
United Farm Equipment & Metal Workers of America

Willard Y. Morris, General Counsel
International Union of Mine, Mill & Smelter Workers

William Standard, General Counsel
National Maritime Union of America

David Scribner, General Counsel
United Electrical, Radio & Machine Workers of America

Maurice Sugar, General Counsel
United Automobile, Aircraft, Agricultural Implement Workers of America

Harry Sacher, General Counsel
Transport Workers Union of America

Harry Weinstock, General Counsel
United Furniture Workers of America

Leon M. Despres, General Counsel,
United Transport Service Employees of America

Matthew Silverman, General Counsel
State, County & Municipal Workers of America

Witt & Cammer, General Counsel
Fur & Leather Workers Union

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the provisions of Rule 27 (9) of this Court, the Congress of Industrial Organizations and certain of its affiliated organizations made application to all of the parties to the instant case for written consent to the filing of a memorandum amicus curiae. Counsel for petitioner gave his consent; counsel for respondents have not given their consent. Special reasons for the granting of this motion are contained in the accompanying memorandum.

INTEREST OF PARTIES FILING THIS MEMORANDUM

The Congress of Industrial Organizations and its affiliated organizations seek leave of the Court to file the within memorandum. The issues of law raised by the instant case are of

basic significance to the existence of collective bargaining under federal labor legislation. We believe, for reasons fully stated in the accompanying memorandum, that the decision rendered by this Court in the instant case, as to which petitioner seeks rehearing, has failed to give sufficient weight to certain aspects of the collective bargaining process described below. The decision affects the administration not only of the Railway Labor Act, which is directly involved in the instant proceeding, but also the administration of the National Labor Relations Act. The decision, in important respects, conflicts with conclusions reached by the National Labor Relations Board in its administration of that Act. The Congress of Industrial Organizations is vitally concerned in the administration of both these Acts and in the unhampered practice of collective bargaining under them.

ARGUMENT

I. THE DISPOSITION OF GRIEVANCES IS A PART OF COLLECTIVE BARGAINING

It is the principal purpose of this memorandum to lay before the Court certain considerations concerning the function played by the disposition of grievances in the bargaining relationship protected and shaped by Federal labor legislation. It is our position that the disposition of grievances is an inseparable part of the collective bargaining process. Since the Court's opinion rests substantially on the opposite view *(infra*, pp. 5–6), and since the relationship between grievances and collective bargaining affects the interpretation of statutes which deal with such bargaining, we shall discuss this matter at some length before turning to the terms of the statute involved and its application to the facts of the instant case.

In adopting the majority rule principle embodied in the Railway Labor Act and the National Labor Relations Act, Congress applied principles long accepted in the field of government. The legislative history of both acts shows that the governmental nature of the collective bargaining process was clearly understood by Congress.[1] "There are . . . legislative,

[1] Thus Coordinator of Transportation Eastman, discussing majority rule under the Railway Labor Act, pointed out that it was necessary in any government and that "the labor union is really a form of government." Hearings on S. 3266, 73rd Cong., 2d Sess. (1934), p. 146; also Hearings on H. R. 7650, 73rd Cong., 2d Sess. (1934), pp. 33–34. The

executive, and judicial phases in collective bargaining."[3] The function of the union, as the exclusive collective bargaining agent of the employees under the Acts is, first, to participate as an equal with the employer in the establishment, by agreement, of working conditions *(infra,* p. 7), and, second, to secure the best working conditions for the greatest number of the employees (*infra,* pp. 11–12). In performing these functions, the union's participation in the disposition of day-to-day grievances is as important as is its participation in the negotiation of formal term contracts.

Using the term in its broadest sense, it is the existence of "grievances" which causes employees to form and join unions. Once recognition has been secured from the employer, the union seeks to dispose of as many grievances as possible in the collective contract. But because it is impossible to dispose by contract of all existing grievances, much less grievances which may arise in the future, trade agreements, except in their most primitive forms, always include provisions establishing a grievance procedure.[4]

Sidney and Beatrice Webb, who coined the term "collective bargaining," regularly used the term to cover not only the making of collective agreements but also the interpretation and application of agreements to specific employees, both retroactively and prospectively.[4] The writings of later authorities have been summarized as follows:

> Authorities in the field of labor relations agree that the interpretation and application of a collective bargaining agreement are essential parts of the collective bargain-

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hearings which preceded adoption of the NLRA are to the same effect. Hearings on S. 2926, 73rd Cong., 2d Sess. (1934) Pt. 1, p. 51 (Prof. Robert L. Hale); *idem.* p. 243 (Prof. E. E. Witte); Hearings on S. 1958, 74th Cong., 1st Sess. (1935) Pt. 1, p. 58 (Secretary Perkins); 79th Cong. Record 7571 (1935) Senator Wagner; 79 Cong. Record 9691 (1935) Representative Withrow. Both the Senate and House Committee Reports on the pending NLRA justified majority rule as an application of tested governmental practices. Sen. Report. No. 573, 74th Cong., 1st Sess. (1935), p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess. (1935), p. 21.

[3] Daugherty, Carroll R., "Labor Problems in American Industry" (5th Ed.), p. 450. These three aspects of the bargaining process are fully discussed in Hoxie, "Trade Unionism in the United States," (1920 ed.) pp. 264–265, 266–267, 270–272. The governmental analogy was fully recognized by this Court in *Steele* v. *L. & N. Railroad,* 65 S. Ct. 226, 232.

[4] "Union Agreement Provisions," Bull. No. 686, Bureau of Labor Statistics, U. S. Dept. of Labor (1942), p. 145.

[4] Industrial Democracy (1920 ed.), pp. 179, 183, 194–195, 198–199, 203–204, 234–237.

ing process. "The rules and regulations first set forth in the contract are elaborated and changed" in the day to day application of the agreement, thus evolving "into a body of industrial common law. . . ." [110] The extent to which the substantive terms of the employment relationship are fixed during the negotiation of the initial contract or the negotiation of amendments thereto, rather than through grievance adjustment varies greatly from industry to industry. In industries where there is an attempt to write into the agreement in as detailed and concrete manner as possible rules covering every contingency which the parties conceive might arise during the term of the agreement, a minimum is left to be adjusted under the grievance procedures.[111] In industries where the agreements "set forth the general framework" of the relationship between the employer and the union and "leave the details to be filled in by daily negotiation," [112] virtually

[110] *Golden and Ruttenberg, The Dynamics of Industrial Democracy* (1942) 43. *Daugherty, Labor Problems in American Industry* (rev. ed. 1938) 450, 452, defines collective bargaining as "the process whereby representatives of a union meet with an employer or representatives of an employers' association to fix the terms of employment for a certain period of time. But it includes more than the creation of an agreement. There is more to it than the negotiations lasting a week or so. It involves also the *enforcement* and *interpretation* of the agreement throughout the months of its duration . . . The *interpretation* of the various detailed terms of the employment contract is one of the most important parts of collective bargaining. . . ." See also *How Collective Bargaining Works* (Twentieth Century Fund, 1942) 51, 244, 314, 360, 362, 418, 566, 596, 644, 652, 736, 801, 858.

[111] *Pierson, Collective Bargaining Systems* (1942) 26-30. Although agreements in bituminous coal fall in this category their grievance machinery has been said to establish "an orderly process by which the rights of both parties could be protected, disputed terms could be interpreted with the minimum of friction, and 'continuous bargaining' could 'take place on subjects not specifically covered by the agreement.'" *How Collective Bargaining Works* (Twentieth Century Fund, 1942) 244. Cf. *Rep. United States Coal Commission, Sen. Doc. No. 195*, 68th Cong., 2d Sess. (1925) Pt. III, p. 1345. The agreements entered into by the International Ladies' Garment Workers have been described as "far more detailed and comprehensive than those of other unions." *Christenson, Collective Bargaining in Chicago, 1929–1930* (1933) 326. Yet in a description of the functions of this union, another author states: "In addition to price settlements, the union is called upon by its members to adjust various other complaints and grievances in the shops. A great number of such disputes—concerning unequal distribution of work, discharges, back pay, or wage rates below the minimum scale—are inevitable under the best phrased contracts and with the most cooperative employers. Their settlement constitutes in bulk and in importance the characteristic of the activity of a union as a business organization." *Carsel, A History of the Chicago Ladies' Garment Workers' Union* (1940) 247–248.

[112] *How Collective Bargaining Works* (Twentieth Century Fund, 1942) 644. See also p. 566, "To the large steel companies, . . . collective bargaining revolves mainly about the settlement of grievances." Cf. *Pierson, op. cit. supra* note 88, 12–20.

> all collective bargaining is conducted through grievance adjustments. In either situation the handling of grievances merges indistinguishably into the fixing of conditions of employment. Viewing collective bargaining as industrial self government, in the former industries grievance adjustment performs primarily a judicial function, in the latter, a legislative function. Even if it were possible in the field of employment relations to separate judicial functions from legislative functions,[23] there is no less reason to extend the principles of democratic representative government to the one than to the other.'[24]

In sum, the grievance procedure establishes "precedents" which "develop over a period of years into a body of industrial common law supplementing the basic contract." [25]

The view outlined above has been adopted by the agency charged with administration of the NLRA. In *Matter of Hughes Tool Co.*, 56 NLRB 981, 982, the NLRB expressly found that "any adjustment of a 'grievance' constitutes . . . bargaining respecting a condition of employment." This view, also, was fully understood by Congress when it adopted the NLRA. The Chairman of the Senate Committee of Education and Labor said at the hearings on that Act:

> "It is assumed, of course, the thing in collective bargaining is that the employers and employees are dealing with grievances. . . ." [26]

This Court, however, apparently unaware of both this conclusion of the NLRB, of the understanding of Congress, and of

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[23] "In a general way it may be said that the settlements of grievances and disputes have been of two kinds—interpretative of the awards of the agreements and supplementary or amendatory to them." Sydenstricker, *Collective Bargaining in the Anthracite Coal Industry*, Bureau of Labor Statistics, Bull. No. 191 (U. S. Dep't of Labor, 1916), 82.

[24] Weyand, "Majority Rule in Collective Bargaining," 45 Col. L.R. 556, 589–590. See also Cooke & Murray, "Organized Labor & Production" (1940), p. 193; George W. Taylor, "The Function of Collective Bargaining," in Am. Management Ass'n, Personnel Series No. 81; "Management's Stake in Collective Bargaining" (1944), pp. 11–13; G. Allen Dash, "Bargaining Through the Grievance Procedure," [this title tells its own story] in *idem*, Personnel Series No. 82; "The Collective Bargaining Agreement in Action" (1944), pp. 3–5; Harry Shulman, *ibid.*, pp. 8, 34.

[25] "Settling Plant Grievances," Division of Labor Standards, Bull. No. 60 (U. S. Dep't of Labor, 1943), pp. 37–38.

[26] Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, Pt. 3, p. 323.

the opinions of students of labor relations quoted above, reached and proceeded upon precisely the opposite conclusion. It rejected the railroad's contention that "the settlement of grievances [is] part of the collective bargaining power, indistinguishable from the making of collective agreements" (Slip-sheet 22). It found a "boundary between collective bargaining and the settlement of grievances" (*idem*). It appears to have approved the Circuit Court decision which modified the NLRB's order in the *Hughes Tool* case, *supra*, which held that "collective bargaining . . . is distinguished from 'grievances' " *(Hughes Tool Co.* v. *NLRB,* 147 F. 2d 69, 72; Slip-sheet 9).

As we shall show further below, the fact that disposition of grievances is part of collective bargaining precludes exclusion of the union from the former process. Before doing so, however, we wish to point out another aspect of the industrial relationship which we believe has been given insufficient weight in the Court's opinion.

II. INDIVIDUAL DISPOSITION OF GRIEVANCES IS INDIVIDUAL BARGAINING

To whatever extent the collective employee representative is excluded from the disposition of employee grievances, to that extent individual bargaining between employer and employee is permitted. Any grievance which is subjected to settlement between the employer and the employee, rather than settlement between the employer and the union, is subjected to a process in which the superior economic power of the employer can play a part. This is true whether the grievance in question is "retrospective" or "prospective" in nature, whether the claimed right is "vested" or "unvested." Even an unadorned claim for wages assertedly due for past work may be improvidently surrendered in whole or in part by an individual in a "settlement" with the employer. Where the collective bargaining agent is excluded there is nothing to prevent the employer from using his superior economic power in its crudest form to secure such settlements. In fact he may take the flat position that any employee who sues him will be discharged, since Federal labor legislation protects employees against discharge for collective action but not for individual action. Even

where such crude tactics are not resorted to,[7] the right to sue his employer to secure, for example, an additional two cents an hour or a promised promotion is not one on which the ordinary employee can place much reliance for the protection of his interests.

It is this very fact which shaped the collective bargaining provisions of our Federal labor legislation. The history of that legislation shows overwhelmingly that it was the intent of Congress to exclude individual bargaining altogether whenever the employees had designated a collective spokesman.

In 1898, this Court gave judicial recognition to the fact that, in the absence of employee organization, "the proprietors lay down the rules and the laborers are practically constrained to obey them." *Holden* v. *Hardy*, 196 U. S. 366, 397. In both the NLRA and the Norris-LaGuardia Act (40 Stat. 70, 29 U. S. C., Sec. 102), the inequality of bargaining power between employer and employee was given express recognition by Congress.[8] It was recognized also by this Court when it sustained the NLRA. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33. As we point out further below (pp. 17–18), this Court held in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 343, 346, that if individual bargaining were permitted to exist contemporaneously with collective bargaining "what was made collectively could be promptly unmade individually."

III. THE APPLICABLE TERMS OF THE RAILWAY LABOR ACT CONFLICT WITH THE COURT'S INTERPRETATION OF THE ACT.

A. *The Extent to Which Employees and Bargaining Representatives Can Participate in the Disposition of Grievances.*

Both the Railway Labor Act and the NLRA provide that the representative chosen by a majority of the employees shall be the exclusive bargaining representative. As this Court

[7] Where unions are well established, contracts may forbid such discharges by limiting the employer's right to discharge to cases where "just cause" exists. Such clauses are by no means universal, however. Moreover, under the rule applied by the Court in the instant case, a discharge in violation of such a contract might be treated as a retrospective grievance, subject to settlement between the employer and the employee alone.

[8] See also the Senate Committee report on the NLRA, Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 3.

held in the *J. I. Case* and *O.R.T.* cases, *supra*, these provisions exclude individual bargaining during the existence of an exclusive bargaining agency. Section 9 (a) of the NLRA which adopts the majority rule principle is subject to the following proviso:

> That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

There is no corresponding provision in the Railway Labor Act. We agree, however, with the apparent conclusion of this Court in the instant case that that Act should be read as though a similar provision appeared therein (Slipsheet 19).

The question in the instant case is whether grievances, or at any rate, the kind of grievances here involved, can be finally settled by agreement between the employer and the employee representative alone. The Court holds that such *union settlements* are not permitted, that there must be settlement with the employees involved. It leaves open the question whether an *employee settlement* alone is sufficient or whether a *joint settlement* with employee and union is necessary (Slipsheet 20–21). It concedes that if employee settlements are permitted, then, as to most grievances at least, the union must be allowed to express its views (Slipsheet 20–21 and particularly note 35). We submit that the Act requires union settlements, with the right accorded to the employee to present grievances but not to participate in their disposition.

The disposition of grievances by employee settlements is precluded by the fact that such disposition, without consent of the union, whether of retrospective or prospective matters, introduces the very individual bargaining which Congress intended to eliminate *(supra)*. That settlement of grievances is "bargaining" was clearly recognized by the Court when it referred to the "power to bargain concerning grievances, that is, to conclude agreements for their settlements" (Slipsheet 14). But if this "bargaining" is to be conducted between the employer and the employee alone, it will be no more than a mockery. As the Court itself points out (Slipsheet 21, note 35), the "carrier would be free . . . to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept."

Considerations such as the above have apparently caused the Court to realize that, at least as to matters arising in the future, the union must have power to effect a binding settlement. Thus the Court grants that union participation is necessary to give the contract which it has secured "uniform application" (Slipsheet 21, note 35). The theory would appear to be that when the union and the employer reach an agreement as to the meaning of a contract term or as to a matter not covered by the contract, they have to that extent modified or added to the contract.[9]

The Court maintains, however, that while this power to effect changes in the contract exists, the union has no power over "retrospective" grievances (Slipsheet 10, 22). We submit that the distinction thus made between "retrospective" and "prospective" matters is (1) not sufficiently precise for the creation of legal rights, (2) unrelated to the actual practice of collective bargaining, and (3) harmful to the position of the employees in collective bargaining.

(1) The line between "retrospective" and "prospective" rights is not clear. Suppose a contract grants two weeks of vacation to any employee with one year's seniority. Can the union and the employer reduce the term to one week on the day before an employee of one year's standing is to go on his vacation? An employee who is discharged, allegedly in violation of a contract may view his grievance as retrospective; yet, his right to reinstatement may be viewed as prospective.[10]

(2) The attempt to draw a line between collective bargaining on the one hand and grievances on the other on the basis of what is prospective and what is retrospective is further

[9] Once it is recognized that the union and the employer can so modify contracts, any possible constitutional objections to the position here advocated is eliminated. Where the union and the employer enter into a contract for one year, specifying wages at a given rate, the employees have just as "vested" a right, in the constitutional sense, in wages for the balance of the term, as they have in past wages. If the union can constitutionally be given power to divest the one, then it can divest the other. The argument that such a constitutional bar does exist was made at the time the NLRA was passed, and it was eventually rejected by this Court in *J. I. Case Co.* v. *NLRB*, 321 U. S. 332.

[10] The area covered by the term "restrospective" is by no means small. It is apparent from the fact that the Court distinguishes between grievances and collective bargaining that it considers all grievances to be "retrospective." This is probably the case. Grievances normally arise as protests over what the employer has done or failed to do. Whatever rights are violated by his action or failure to act are "retrospective" or "accrued."

weakened by the fact that such a line is entirely foreign to the practice of collective bargaining. Thus the Court is forced to concede that the process of collective bargaining includes the settlement of past disputes (Slipsheet 22). At the same time it concedes that a grievance dispute "may look to the future as well as the past, as it often does" (Slipsheet 22, note 39). It is apparent, therefore, that whenever the employer meets with his employees, with or without their representative, the discussion will be concerned inseparably with both what the Court treats as collective bargaining matters and what it treats as grievance matters.

Without denying that this duality must pervade all bargaining conferences, the Court requires the parties to bear in mind that any agreement reached between the union and the employer can have only prospective effect. They must understand that regardless of any agreement reached by the parties, individual employees may later claim that a contract which has been assigned one meaning by the parties thereto in fact had another meaning. We do not believe that collective bargaining has ever been carried on in such a fashion or that the statutes were intended to require such bargaining.

(3) Finally, the fact that each grievance adjustment is potentially a precedent makes of the rule adopted by the Court a powerful weapon for weakening collective employee action. After the employer has decided several grievances about a particular matter without consulting the union, it is unlikely that the union will be able to achieve a different result. Thus the union may be faced with a *fait accompli* established by the employer while dealing with employees who lack the strength of collective support.

It follows that the employees as a group have an interest in each grievance which can only be protected by their spokesman. This interest exists, no matter how apparently trivial the individual grievance. In the interest of effective protection of the employees as a class, no area may be left open to individual bargaining. It is a fundamental principle of collective bargaining that "the terms of employment must be standardized; . . . that the standardization of a few major terms of employment is not enough; all the conditions, down to the last minute item, must be made uniform. . . . Competition among workers must not enter in at any point, however

small. . . ." Daugherty, Carroll R., "Labor Problems in American Industry" (5th Ed., 1941) pp. 447–448.

Neither may the union's right to participate be limited by the number of employees directly affected by a grievance or the extent to which it requires reconsideration of contract terms. The employees as a group have an interest in each grievance, no matter how trivial the case or how apparently clear the application of the terms of the contract. There is no point at which it can be said that a particular grievance is sterilized of all elements of collective bargaining. The very fact that it has become a case requires the conclusion that an issue exists, the disposition of which must indicate the line of policy along which similar cases will be settled.[11]

Aside from the direct effect of each grievance adjustment on other employees, there is a broader and more fundamental relationship between each employee grievance and the collective bargaining conducted by the employee body as a whole. Collective bargaining, as its name shows, is a process of trading. It aims at reaching an agreement embodying a compromise between what the employer is willing to grant his employees collectively in order to secure their labors and what the employees collectively are willing to accept in exchange for their labors. Just as a merchant, making a sale of several items to a customer, must decide on which prices to yield and which to maintain, so the employees, acting through their representative, must decide which benefits for which employees in the group shall be considered an acceptable basis for agreement. At the same time, every grievance is a part of the sum of demands the employees may make upon the employer. These demands become the subject of negotiations between

[11] The manner in which relatively minor matters can affect the employees at large may be seen in the case of the employee who complains of insufficient lighting on his particular job. Let us assume that this employee finds the lighting unsatisfactory only because he suffers from an unusual optical affliction. An adjustment of this grievance will of necessity involve a determination of the extent to which the employer is willing to make allowances for physical disabilities. It will establish policies concerning the maintenance of working conditions on the job suitable to each employee. It will raise the question also of finding other ways of meeting such problems, such as by transferring handicapped employees to positions to which they are suited. The case of the employee who has a grievance about his personal relationship with his foreman stands on no different footing. Such a matter cannot be settled without creating or qualifying to a policy on plant discipline and the extent and nature of the duties imposed on employees and supervisors.

employer and employees. Each demand granted reduces the ability or likelihood of the employer to grant others. So, when he grants the demand of individual employees, he impairs the ability of the employees as a whole to secure the aims which they deem best suited to the group as a whole. In short, whether the employer's unilateral action takes the clearly illegal form of a unilateral wage increase, or the form of granting an individual grievance, it has the effect of making a decision for the employees which they might not have arrived at.

The effect on the employees' position of unilateral adjustments may not be considered unimportant because in the case of each grievance it is relatively small. When it is a regular practice for an employer to dispose of grievances without consulting the employees' representative, the impairment of the interests of the employees as a whole may become substantial indeed.

It is important to note that the arguments above are not restricted to the situation where the employer uses his superior economic position to force the individual employee to accept less than what the union might have secured him. Collective action is just as effectively disrupted when the employer gives special benefits to individual employees. "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages." *J. I. Case Co.* v. *N.L.R.B.*, 321 U. S. 332, 338. Since, under collective bargaining, "individual advantages or favors will generally in practice go in as a contribution to the collective result" (*id.*, at p. 339), the employees, through their representative, must have the right to decide which advantages to forego and which to adhere to as the price for their collective employment. Employer favoritism to those resorting to individual dealing leads to desertion of the union, while employer pressure on individuals to accept employment on less advantageous terms leads union members to fear displacement.

In sum, collective bargaining "substitutes group action for individual action in negotiating, interpreting and enforcing contracts and agreements." [13] "The only way to prevent this deterioration is to rule out all competition between the indi-

[13] "An Introduction to the Study of Labor Problems." Watkins, Gordon (1922), pp. 332–333.

vidual workers of the group both in the making of the bargain with the employer, and in the subsequent interpretation of it and work under it." [3]

The individual's right can only be confined to the presentation of grievances and the power of the union must embrace their exclusive disposition. Adoption of a rule requiring joint disposition of grievances, by employer, union and employee would not obviate the objections described above. By requiring union consent to any disposition, the standards of the employee group would be better protected than if the union were excluded. But it is easy to see that such an arrangement would have serious complications. Once the employer had persuaded the employee to accept less than what the union deemed satisfactory, the union's position would become impossible to maintain.

In fact, a serious drawback of both the tri-partite disposition and the employee disposition rules is that the individual employee is set against the union and even encouraged to withdraw from it. The decision requires the union to secure from each employee a specific authorization before it can handle his grievance. At the same time it supplies a most powerful inducement to the employee *not* to give such an authorization. If he does empower the union to act for him, he is bound by what the union does, whether good or bad. If he refuses the authorization, he is bound to get the benefit of any favorable settlement secured by the union, and if the union fails he can still sue independently. Many employees may seize such an opportunity to get two bites at the apple.

Another objection to the result reached by the Court herein is that it removes the adjustment of grievances from the requirement laid down by the Railway Labor Act and the NLRA that employers bargain collectively with majority representatives. This follows necessarily from the Court's holding that the disposition of grievances is something apart from collective bargaining. The employer could insist on the presence of all affected employees in every grievance adjustment, *even where the employees had authorized the union to speak for them.* Since such authorizations would create no more than a common law agency, under the Court's theory, the employer's right to ignore them would be unaffected by the Federal Acts.

[3] "Trade Unionism in the United States." Hoxie, R. F. (1922), p. 256.

Moreover, in view of the technicality of the law of agency, the employer would probably be ill-advised if he did not attempt to remove all doubts by exercising his right to ignore the authorizations.

We earnestly urge upon the Court the point already mentioned above (pp. 3–5), that the collective bargaining process has always been viewed by the participants thereto as including the settlement of grievances and, more particularly, that employers and unions have always considered that they had the power to dispose of grievances on a large scale. We call to the attention of the Court the agreement involved in this very case, referred to by the Court in its opinion (Slipsheet 4, note 5), by which the union and the railroad tried to settle all similar claims then existing. We cannot overestimate the serious consequences of making such agreements ineffective. They are commonly made wherever collective bargaining is established. It will be extremely disturbing to employers and employees alike when employers discover that there is no way, short of settlement with each employee, whereby pending disputes and the possibility of future legal actions can be eliminated.

B. *The Terms of the Railway Labor Act*

The Court appears to believe, however, that all of the considerations outlined above must be swept aside because the terms of the Railway Labor Act require the interpretation it has reached. We submit, on the contrary that the terms of the Act, both separately and collectively, support our position. The chief question, in this connection, is whether the Act makes such a basic dichotomy between the two types of "disputes" described in clauses (4) and (5) of the Introduction to Section 2 as to require the conclusion that the Act establishes exclusive representation through the majority choice as to the first type of dispute but not as to the second.

The contention that such a dichotomy is made is refuted at the outset by the terms of Section 2 Second which provides that "*All* disputes [*i.e.*, both kinds as viewed by the Court] between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference *between representatives designated and authorized so to confer*, respectively, by the carrier or carriers and *by the*

employees thereof interested in the dispute." (Italics supplied.) It is apparently the Court's position (Slipsheet 16–17) that the words "representatives designated . . . by the employees" mean the statutory exclusive representative in the case of one kind of "dispute" but that they mean any common law agent in the case of the other type. We submit that a more natural interpretation of the words is to give them the same meaning, regardless of the type of "dispute" involved.

In any case, Section 2 Sixth removes all doubt on this score. It applies only to grievance disputes and provides that in the case of such disputes, "It shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees to confer." Clearly, this language discloses the intention of Congress to have this type of dispute settled through the established practices of collective bargaining.

In sum, up to the point where disputes go before the government agencies created by the Act, the procedure envisaged by the Act is the same. As this Court itself held (Slipsheet 11):

> *The Act treats the two types of dispute alike* in requiring negotiation as the first step toward settlement and therefore in contemplating voluntary action for both at this stage in the sense that agreement is sought and cannot be compelled. To induce agreement, however, the *duty to negotiate* is imposed for both *grievances* and major disputes. (Italics supplied.)

We repeat that we think it unlikely that two different kinds of negotiations are intended at this point.

The Act, of course, does divide disputes into two classes for the purpose of disposition by the Adjustment and Mediation Boards. Grievance disputes go to the former. The division is no more than that which is always made in collective bargaining between those matters which are dealt with in the formal contract and those which are disposed of through the grievance procedure. The Adjustment Board procedure is in fact just that—a grievance procedure. It corresponds closely to the arbitration procedures commonly set up in trade agreements. As is the case with grievance procedures generally, as noted above (pp. 3–5), Adjustment Board decisions do, in fact, "mold and modify railway collective agreements." [14]

[14] "The National Railroad Adjustment Board," Spencer, U. of Chi. Journal of Business, Vol. XI, No. 2, Part 2, May 1938, pp. 30–31.

The Court also relies on certain specific provisions of the Act in reaching its conclusions. It is sufficient to note here that the provisions of Section 3 of the Act concerning proceedings before the Adjustment Board contemplates steps to be taken only by employers and employees. As to the employees, we believe that this means the exclusive bargaining agent, where one has been chosen. Unless it is so construed, unions would have no right to take any steps before the Adjustment Board. This was certainly not contemplated by Congress or anyone interested in the Act. As we show below (pp. 17–18) the decisions of this Court fully support the theory that, where an exclusive bargaining agency exists, the representative chosen is the employees' so far as their relations with the employer are concerned."

With respect to statutory interpretation, one further point may be made. The NLRA, at least, bears internal evidence that Congress considered the presentation of grievances to be a part of collective bargaining. The provision concerning presentation of grievances by individual employees is attached to the very section (9(a)) which guarantees to the majority representative the right to act as the exclusive representative "for the purposes of collective bargaining." If Congress had not considered the presentation of grievances to be a part of the collective bargaining, it would not have included this proviso in the section dealing with collective bargaining. It would have considered that employees had the right to present grievances without the express grant which the proviso contains.

The legislative history of the proviso to Section 9(a) of the NLRA strongly supports, as to that Act at least the interpretation which we here urge. For reasons of space, we respectfully refer the Court to the article from which we have already

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" The phrase, "in person," in Section 3 First (j), relied on by the Court (Slipsheet 18–19), is otherwise explained. Such phrases as "in person, by counsel, or otherwise" are ordinarily used whenever reference is made in a statute to appearances at a hearing. Moreover, it was necessary to use the phrase here to cover the possible case of a railroad owned by one or more individuals. Although rare, such railroads exist. See Finance Docket 14802, *R. J. Fox Purchase*, decided by the Interstate Commerce Commission, April 13, 1945, where the I. C. C. approved the purchase of a railroad from a corporation by an individual who, by virtue of the purchase, in the words of the I. C. C., "has become a carrier."

Section 3 First (p), on which the Court also relies (Slipsheet 19–20) shows only that *after* the exclusive bargaining agent has secured an Adjustment Board decision through proceedings under the Act, may individual employees sue in the Courts on the award made.

quoted for a full description of that history. "Majority Rule in Collective Bargaining," Ruth Weyand, 45 Col. L. R. 556, 584–586.

IV. DECISIONS OF THIS COURT PRECLUDE IMPAIRMENT OF THE COLLECTIVE BARGAINING PROCESS BY PERMITTING INDIVIDUAL SETTLEMENT OF GRIEVANCES.

The landmark decisions of this Court interpreting the collective bargaining provisions of the Railway Labor Act and the NLRA fully support the position we take here. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332; *Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U. S. 342; *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678. In fact, we believe the Court's decision in the instant case departs in important respects from these three decisions.

First, this Court held in the *O. R. T.* case, 321 U. S. at p. 346, that "collective bargaining was not defined by statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." In the instant case, the Court, we believe, has departed from this doctrine by failing to give any weight to the fact that labor unions have always handled the disposition of grievances together with and as a part of their activities as collective bargaining representative (*supra*, pp. 3–5).

Second, this Court squarely held in the *Case* and *O. R. T.* cases that statutory exclusive collective bargaining bars all individual bargaining, since otherwise "what was made collectively could be promptly unmade individually." *O. R. T.* case, 321 U. S. at p. 346. The instant decision is clearly at war with this principle. Individual bargaining on a wholesale scale would be let in by the back door. This is true even as to the employer who does not desire to disrupt union relationships. He is forced to bargain with the individual employee whether he wants to or not. To the hostile employer, the decision clearly supplies a powerful union-smashing weapon. As soon as he has signed a contract, he can start chipping away at it at every possible point and then treat all violations as grievances to be settled individually.

Third, the cases cited firmly establish the theory that when

"the majority . . . collectivizes the employment bargain" (*J. I. Case* decision, 321 U. S. at p. 339) all relationships with the employer with respect to working conditions must be on a collective basis. As stated by this Court in the *Medo* case, 321 U. S. at p. 685, "orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves. . . ." The Court, we submit, has departed from this principle in holding here that, in a large and important area, the employer may and must deal with the employees directly as though no collective bargaining representative existed.

Another decision of this Court throws light on an additional fallacy in the Court's opinion. In *NLRB* v. *Hearst Publications Inc.*, 322 U. S. 111, this Court stressed the importance of avoiding technical common law concepts in administering such national legislation as the NLRA. Yet here the Court, in holding that each employer must deal with each employee in settling grievances unless the employee has authorized the union to act for him, has held that the existence of such authorization must be determined not in the light of "statutory influences" (Slipsheet 24), but on the basis of "generally accepted or 'common law' rules for the creation of an agency" (Slipsheet 22, note 38). The burden of the opinion in the *Hearst* case is that, as to the scope of the word "employee," there is no such general common law meaning (see, particularly, 322 U. S. at pp. 120–124). We submit that there is no greater "simplicity and uniformity" (322 U. S. at p. 122) in the common law of agency and that the authority of the union to speak for the employees should be determined "with reference to the purpose of the Act and the facts involved in the economic relationship." *Hearst* case, 322 U. S. at p. 129. If this is done, we believe the interpretation which we here urge will be accepted.

V. FINDINGS OF THE NATIONAL LABOR RELATIONS BOARD, INTERPRETING THE NATIONAL LABOR RELATIONS ACT ARE INCONSISTENT WITH THE RESULT REACHED BY THE COURT.

Consistently with the consideration stated above, the NLRB, charged with administration of legislation companion to the Railway Labor Act, has reached the following conclusion as to the proper interpretation of the grievance proviso

to Section 9(a) of the NLRA: Individual employees may present grievances to the employer and appear in behalf of themselves at every stage of the grievance procedure to urge their point of view. The exclusive representative of the employees, if such a representative has been chosen, must be given the opportunity to be present at every stage in the grievance procedure to negotiate with the employer concerning disposition of such grievance. Only if exclusive representative declines to appear, the employer may dispose of the grievance in meetings with the individual employees alone." This Court has held that "upon such questions of law, the experienced judgment of the Board is entitled to great weight." *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 682, note 1.

VI. THE DECISION OF THE COURT WOULD NOT GIVE INDIVIDUAL EMPLOYEES ANY PROTECTION AGAINST ACTIONS BY THE MAJORITY REPRESENTATIVE TO WHICH THEY ARE ENTITLED.

The Court bases its decision not only on the terms of the Act but also on what it believes to be the necessity of protecting the individual employee against the union (Slipsheet, 18, 20, 23). If by this the Court means that it must protect the legitimate interests of the minority against the legitimate interests of the majority, we submit that it is clearly departing from the intent expressed by Congress when it adopted majority rule and that it is also departing from its decisions in the *Case* and *O. R. T.* cases, *supra*. Minorities are not deprived of a voice in their own affairs by majority rule. They can express themselves, first, through participating in the choice of representatives, second, by activity as a member of the representative organization, and, third, by presenting grievances to the employer (*infra*, p. 20). But where there is a conflict, it is of the essence of majority rule that the majority rules." If individual employees are given the separate

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[16] *Matter of Hughes Tool Co.*, 56 NLRB 981; *Matter of United States Automatic Corp.*, 57 NLRB 124.

[17] See the testimony of Joseph B. Eastman at the hearings on the 1934 amendments to the Act (Hearings before the Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess. (1934) 33–34): "The minority ought to have every opportunity to air their views. As one who has dissented frequently in the past, I am strong for that; but yet I believe in the rule of the majority. Government cannot be subdivided into factions—and the labor union is really a form of government."

right to secure advantages from the employer, a premium is placed on staying out of the union (*supra*, p. 13), the employee gets an individual advantage which this Court has held to be inconsistent with collective bargaining (*supra*, pp. 17–18), and the employees as a group are prevented from securing what they believe to be optimum conditions for the group (*supra*, pp. 11–12).

If, on the other hand, the Court is concerned with protection of employees against actions by representatives which do not in fact seek the greatest good for the greatest number or which deliberately discriminate against minorities among the employees, we submit that it should not attempt to provide that protection by substantially impairing the collective bargaining process. In the first place, no such case is presented here. There is no claim that the union acted improperly in its handling of the grievance involved or that it discriminated against respondents. In the second place, this Court has held that the rights of employee groups may be protected against improper action of employee representatives by other means. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood*, 323 U. S. 210; *Wallace Corp.* v. *NLRB*, 323 U. S. 248. And the democratic principle of majority rule can be made to work best by strengthening democratic action within the employee group. In the third place, the "protection" secured to employees by permitting them to settle matters individually with the employer *is entirely illusory*. As we believe we have shown, the employee may easily be persuaded to take less than he is entitled to, and, when he gets more, it is only by sacrificing the rights of the group as a whole and, to that extent, his own rights in the long run.

We have referred above to the fact that individual employees have the right to present grievances to the management. The interpretation placed by the NLRB on the grievance proviso to Section 9(a) of the NLRA (*supra*, p. 19) preserves this right and makes it, in effect, the right to present to the management and the union for decision. This right is not by any means "more of shadow than of substance" as suggested by the court (Slipsheet 20). The right to present one's case and to urge its merits upon those with whom the decision rests is a substantial right. But the power to decide must rest somewhere and the statute, we believe, has placed it with the em-

ployer and the bargaining representative. In those cases where an employee and the employee spokesman are not in agreement, it is not unreasonable to insist that the views of the majority shall prevail.

For the reasons stated above we urge that the petition for rehearing be granted and that upon such rehearing the decision of the Court be reversed.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
Counsel for Congress of Industrial Organizations
United Steelworkers of America and
United Railroad Workers of America

n J. Abt, Special Counsel
malgamated Clothing Workers of America

ph Helstein, General Counsel
nited Packinghouse Workers of America

lore Katz, General Counsel
extile Workers Union of America

dstein, Grossman, Sawyer & Edises,
eral Counsel
nternational Longshoremen's & Warehousemen's Union

din, Cohn & Glickstein,
eral Counsel
nited Office & Professional Workers of America

tor Rabinowitz, General Counsel
merican Communications Association

rris Isserman, General Counsel
merican Newspaper Guild

H. Goldstein, General Counsel
ndustrial Union Marine & Shipbuilding Workers of America

Meyers, General Counsel
nited Farm Equipment & Metal Workers of America

Willard Y. Morris, General Counsel
International Union of Mine, Mill & Smelter Workers

William Standard, General Counsel
National Maritime Union of America

David Scribner, General Counsel
United Electrical, Radio & Machine Workers of America

Maurice Sugar, General Counsel
United Automobile, Aircraft, Agricultural Implement Workers of America

Harry Sacher, General Counsel
Transport Workers Union of America

Harry Weinstock, General Counsel
United Furniture Workers of America

Leon M. Despres, General Counsel,
United Transport Service Employees of America

Matthew Silverman, General Counsel
State, County & Municipal Workers of America

Witt & Cammer, General Counsel
Fur & Leather Workers Union